

IAPT6 Rec'd PCT/PTO 17 DEC 2007

TO: **Mail Stop 8**  
**Director of the U.S. Patent & Trademark Office**  
**P.O. Box 1450**  
**Alexandria, VA 22313-1450**

**REPORT ON THE**  
**FILING OR DETERMINATION OF AN**  
**ACTION REGARDING A PATENT OR**  
**TRADEMARK**

In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Northern District of California on the following  Patents or  Trademarks:

DOCKET NO.	DATE FILED	U.S. DISTRICT COURT
C-07-5895-BZ	November 20, 2007	Office of the Clerk, 450 Golden Gate Ave., 16 <sup>th</sup> Floor, San Francisco, CA 94102
PLAINTIFF	DEFENDANT	
THE TONYTAIL COMPANY, INC.	CONAIR CORPORATION, et al.	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 D 413,693		
2 D 453,239 S		"Pls. See Attached Copy of Complaint"
3 6,263,884 <sup>81</sup>		
4		
5		

In the above—entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY	<input type="checkbox"/> Amendment	<input type="checkbox"/> Answer	<input type="checkbox"/> Cross Bill	<input type="checkbox"/> Other Pleading
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK			
1					
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK	(BY) DEPUTY CLERK	DATE
Richard W. Wierking	Thelma Nudo	November 20, 2007

Copy 1—Upon initiation of action, mail this copy to Commissioner Copy 3—Upon termination of action, mail this copy to Commissioner  
Copy 2—Upon filing document adding patent(s), mail this copy to Commissioner Copy 4—Case file copy

1       48. Upon information and belief, the infringing product was manufactured in whole  
2 or in part by Scunci, Intl., Ltd., a corporation that was previously controlled and wholly owned  
3 by defendant L&N Sales & Marketing, Inc, and presently controlled and wholly owned by  
4 Defendant Conair, Inc.

5       49. Upon information and belief, the Scunci infringing device has been distributed  
6 to defendant Rite Aid by defendants' agents and/or employees or persons or companies with  
7 which defendants Conair and Scunci have a contractual relationship for the purposes of  
8 infringing device distribution. The Scunci infringing device has been entered into commerce  
9 and has been offered for sale and sold by Defendants and/or their affiliates in California and  
10 within this judicial district.

### **THIRD CAUSE OF ACTION**

**(Induced Patent Infringement Under 35 U.S.C. § 271)**

13 50. Plaintiff incorporates the allegations of paragraphs 1 through 49 above as though  
14 fully set forth herein.

15       51.   Upon information and belief, in violation of 35 U.S.C. §§271(a), 271(b), and/or  
16 271(c), Defendant DOES 1-10 have infringed directly and continue to infringe the U.S. Patent  
17 No. 6,263,884 B1 (hereinafter the '884 patent) by practicing one or more of the claims of the  
18 '884 patent in consumer use of infringing product Ponytailer product line, including but not  
19 limited to the "Scunci Ponytailer."

20        52.    Upon information and belief, in violation of 35 U.S.C. §§271 (a), 271(b), and/or  
21 271(c), Defendants have infringed directly and/or indirectly and continue to infringe, the '884  
22 utility patent by practicing one or more of the claims of the '884 patent in manufacture, use,  
23 offering or sale, and/or importation and exportation of the infringing product Ponytailer product  
24 line, including but not limited to the "Scunci Ponytailer."

25        53. Upon information and belief and in violation of 35 U.S.C. §271, Defendants  
26 have infringed and are continuing to infringe the '884 utility patent by actively inducing the  
27 infringement by others of the '884 patent through the manufacture, use, offering for sale, sale

1 and/or importation and exportation of the infringing product Ponytailer product line, including  
2 but not limited to the "Scunci Ponytailer."

3 54. Plaintiff is the owner by assignment of the '884 utility patent.

4 55. Plaintiff's '884 utility patent was duly and validly issued by the United States  
5 Patent and Trademark office after having been examined according to law.

6 56. Upon information and belief, Defendants have willfully infringed the '884  
7 utility patent.

8 57. Upon information and belief, Defendants' acts of infringement of the '884 utility  
9 patent will continue after service of this complaint unless enjoined by the court.

10 58. As a result of Defendants' infringements, Plaintiff has suffered and will suffer  
11 damages.

12 59. Plaintiff is entitled to recover from Defendants the damages sustained by  
13 Plaintiff as a result of Defendants' wrongful acts in an amount to prove at trial.

14 60. Unless Defendant is enjoined by this court from continuing its infringement of  
15 the '884 utility patent, Plaintiff will suffer additional harm and impairment of the value of its  
16 patent rights. Thus, Plaintiff is entitled to a preliminary and permanent injunction against  
17 further infringements.

18 61. Upon information and belief, Defendants, by their manufacture and sale of the  
19 Scunci infringing products, have offered said infringing devices for sale to the general public  
20 and into the stream of commerce, for their use in practicing the process patented by Plaintiff,  
21 constituting a material part of plaintiff's invention.

22 62. Upon information and belief, Defendants were not authorized to make, sell or  
23 distribute any infringing devices which fall within one or more claims of the '884 utility patent.

24 63. Upon information and belief, Defendants and its successors in interest have had  
25 and continue to have notice of the existence of the '884 Patent due to its previously executed  
26 2003 settlement and license agreement with Plaintiff and despite such notice continue to  
27 willfully, wantonly and deliberately engage in acts of infringement as that term is defined in  
28

1 Title 35 U.S.C. §281, without regard to the '884, and will continue to do so unless otherwise  
2 enjoined by this court

3

4 **FOURTH CAUSE OF ACTION**

5 **(Trademark Infringement)**

6 64. Plaintiff hereby incorporates the allegations of paragraphs 1 through 63 above as  
7 though fully set forth herein.

8 65. Plaintiff is the owner of the registered mark "Tonytail®".

9 66. Upon information and belief, Defendants have displayed for sale its Scunci  
10 Ponytail Holder in commerce in a retail display location labeled for Plaintiff's registered mark  
11 product, thereby creating consumer confusion with Plaintiff's mark. The use of "Tonytail®"  
12 mark on sales display materials to offer for sale the Scunci "Ponytailer or Ponytail Holder"  
13 causes substantial consumer confusion in commerce.

14 67. The use of the sales display materials labeled "Tonytail®" by defendants in  
15 commerce is likely to cause confusion as to the source, origin or sponsorship of the infringing  
16 device, inducing consumers to purchase such a device believing it to be Plaintiff's products  
17 protected by its registered mark.

18 68 Upon information and belief, Defendants intended to cause confusion as to the  
19 source, origin, or sponsorship of the Plaintiff's device by selling its "Ponytailer" marked goods  
20 on the same retail hook as Plaintiff's marked goods and unfairly under the same trademark  
21 name as Plaintiff's marked goods.

22 69. Defendants' use in commerce of the name "Tonytail®" infringes Plaintiff's  
23 registered trademark "Tonytail" and is in violation of the Title 15, U.S.C. § 1114.

24 **FIFTH CAUSE OF ACTION**

25 **(Violation of Federal Lanham Act; False Designation of Origin**

26 **Under 15 U.S.C. §1125)**

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1           70. Plaintiff hereby incorporates the allegations of paragraphs 1 through 69 above as  
2 though fully set forth herein.

3           71. Defendants infringing product designs unfairly originated from Plaintiff's  
4 protected trade dress product design.

5           72. Upon information and belief, Defendants have falsely designated the origin of  
6 the Ponytailer infringing product line design to be confusingly similar to Plaintiff's  
7 "Tonytail®" protected trade dress device design.

8           73. Defendants have passed off Plaintiff's design trade dress as its own and  
9 misappropriated Plaintiff's intellectual property rights as a result of its sale of the Ponytailer  
10 infringing product line design when it had reason to know that such infringing device design  
11 was the unregistered design trade dress of Plaintiff. In its efforts to solicit purchasers for the  
12 sale of said infringing device design, Defendants have willfully committed a false designation  
13 of origin with respect to Plaintiff's intellectual property in the form of Plaintiff's unregistered  
14 design trade dress, the Tonytail®, thereby causing substantial consumer confusion.

15           74. Said false designation of origin was and is without the consent, either explicit or  
16 implied, of Plaintiff.

17           75. The product design trade dress Tonytail® ponytail wrap has been the subject of  
18 substantial efforts to acquire and maintain its distinctiveness, including infringing devices  
19 design patents D 413,693, D 453,239 and the subsequent infringing device design trade dress  
20 embodied in the overall look and appearance of Plaintiff's protected device.

21           76. The infringing device design of Defendant's Scunci Ponytailer device line and  
22 its false designation by Defendants caused by selling Scunci products on the "Tonytail" retail  
23 hooks is likely to cause consumer confusion.

24           77. The product design trade dress Tonytail ponytail wrap has been the subject of  
25 substantial efforts to acquire and maintain its distinctive product design, including product  
26 design patents 'D693 and 'D239 and the subsequent infringing device design trade dress  
27 embodied in the overall look and appearance of Plaintiff's protected device.

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1           78. Defendants' use of the "Tonytail" trade dress device design is in violation of  
2 Title 15 U.S.C. § 1125(a).

3           79. Defendants' misappropriation and unfair use of the protected device design trade  
4 dress in interstate commerce was a commercial use of the mark within the meaning of the  
5 statute. Further, the Defendants' bad faith use by unfairly passing off its Ponytailer infringing  
6 device design to confused consumers prevented them from being able to buy the true  
7 "Tonytail". Such use by Defendants was not approved by Plaintiff and as part of Plaintiff's  
8 protected product design trade dress, constitutes a false designation of origin for the  
9 misappropriation of Plaintiff's rights. As a direct result of Defendants' attempt at passing off  
10 Plaintiff's property as its own and therefore is actionable under § 43(a) of the Lanham Act, 15  
11 U.S.C. § 1125(a).

12           80. Defendants have acted recklessly, willfully and purposefully with the intention  
13 of misleading the public into believing that it owned all of the rights to Plaintiff's protected  
14 product design trade dress, which has resulted in substantial consumer confusion and  
15 significant lost revenue and profits for the Plaintiff.

16           81. Defendants and their successors in interest have had and continue to have notice  
17 of the existence of the device design trade dress due to its previously executed 2003 settlement  
18 and license agreement with Plaintiff for its 'D453,239 design patent and despite such notice  
19 continue to willfully, wantonly and deliberately engage in acts of infringement as that term is  
20 defined under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), without regard to the 'D453,239  
21 protected device design and the corresponding device design trade dress, and will continue to  
22 do so unless otherwise enjoined by this court

23           82. Defendants' misappropriation and false designation of origin of Plaintiff's  
24 unregistered device design trade dress intellectual property as Defendants' own was, and is,  
25 willful, reckless and outrageous because of Defendants' purposeful motive and reckless  
26 indifference to the rights of Plaintiff.

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83. Plaintiff has been and will continue to be damaged by Defendants' false designation of origin.

## PERMANENT INJUNCTION – 35 U.S.C. §283

84. Plaintiff hereby incorporates the allegations of paragraphs 1 through 83 above as though fully set forth herein.

85. In addition to monetary damages, Plaintiff seeks a permanent injunction to prevent Defendants from continued infringement of Plaintiff's patents, trademark and trade dress product design.

9        86. Because of Defendants' infringement, Plaintiffs have been, and will continue to  
10 suffer irreparable injury, for which the remedies available at law provide inadequate  
11 compensation. Defendants' infringement thus warrants a remedy in equity and such remedy  
12 will not disserve public interest.

13 87 Unless enjoined, Defendants will continue to infringe and induce infringement  
14 of the 'D693 Patent, 'D239 Patent, '884 Patent, registered trademark "Tonystail" and trade dress  
15 product design.

16        88.    Based on the foregoing and on Plaintiff's valid and enforceable patent rights,  
17 Plaintiff has a reasonable likelihood of succeeding on the merits.

18 89. Plaintiff owns all rights to the manufacture, marketing and distribution of  
19 products which fall within the scope of its patents. Therefore, continued infringement will  
20 cause irreparable harm to Plaintiff, if a permanent injunction is not granted.

21       90. Plaintiff's business and business income is predicated on its exclusive rights to  
22 manufacture market and distribute products which fall within the scope of its patents. Whereas  
23 Defendants' business interests encompass a wider variety of products and/or practices, they  
24 have wider sources of income.

25        91.    Based on the foregoing, Plaintiff readily satisfies the burden of a permanent  
26 injunction.

## **SIXTH CAUSE OF ACTION**

**(Unfair Competition -- B&P §§17200 *et. seq.*)**

2 92. Plaintiff hereby incorporates the allegations of paragraphs 1 through 91 above as  
3 though fully set forth herein.

4       93. Defendants Conair/Scunci and Rite Aid knowingly and intentionally produced  
5 and marketed hair accessories that unfairly were confusingly similar to Plaintiff's "Tonystail"  
6 product design trade dress.

7 94. Defendants Conair/Scunci knowingly and intentionally produced and marketed  
8 hair accessories that fell within the scope of patent protections secured by Plaintiff. The  
9 substantial similarity of the Scunci/Conair infringing products constitutes a violation of  
10 Plaintiff's patent rights under Title 35 §271. Due to Defendants alleged patent infringement and  
11 other intellectual property law violations of 15 U.S.C. §1114 and 15 U.S.C. §1125, Defendants  
12 have acted unlawfully within the meaning of B&P §§17200 *et. seq.*

13 95. Defendants continuously engaged in unfair trade practices and unfair  
14 competition against Plaintiff. It violated the patent, trademark and trade dress laws and harms  
15 competition. Unlawful conduct is an unfair business practice actionable under the UCL, B&P  
16 §§17200 *et. seq.*

17       96.    Scunci's infringing products were offered for sale in Rite Aid stores,  
18 commingled on shelves and other forms of display with other Scunci and Tonytail devices. The  
19 hooks in the stores bore the Tonytail® mark and designation, and had Scunci infringing devices  
20 displayed on them. The hooks which were labeled as Scunci Ponytailer had Tonytail® devices  
21 displayed. Further, when Defendants provided the Scunci Ponytailer infringing device design  
22 in product display locations designated for the Tonytail® device line, it intended to falsely  
23 designate the origin of such goods as its own and not that of Plaintiff's, thereby fraudulently  
24 designating such origin of the goods. This manner of promotion was deceptive, and had the  
25 tendency to mislead the public into believing that Scunci produced the Tonytail, was one and  
26 the same company or that Scunci infringing devices were approved by, or otherwise associated  
27 with the Plaintiff.

1       97. Upon information and belief, due to Defendants' unlawful patent, trademark and  
2 trade dress infringement, as well as fraudulent sales practices, Defendants' alleged infringing  
3 devices were sold in the very location of Plaintiff's patented and trade dress protected devices  
4 thereby causing substantial damages and irreparable harm to Plaintiff. Further, consumers were  
5 deceived leading to overall consumer confusion in the market for these goods. Plaintiff's  
6 ability to compete was thereby significantly impaired and buyers subsequently abandoned  
7 negotiations further leading to irreparable harm.

8       98. Plaintiff has been, and will continue to be irreparably harmed and injured by  
9 Defendants' efforts designed to unfairly compete with Plaintiff in violation of Business and  
10 Professions Code §§17200 *et. seq.*

## **SEVENTH CAUSE OF ACTION**

## **(Common Law Unfair Business Practices)**

13       99. Plaintiff hereby incorporates the allegations of paragraphs 1 through 98 above as  
14       though fully set forth herein.

15       100.    The Plaintiff Tonytail Company has invested substantial time and money in the  
16 development of its proprietary device lines, patented devices, market knowledge, trademarked  
17 goods, and trade dress device design of the Tonytail® device line and the Tonytail patents. This  
18 property constitutes the basis of Plaintiff's business goodwill and reputation.

19 101. Defendants Conair/Scunci copied not only protectable elements but the entire  
20 invention of the Tonytail®. Conair/Scunci's infringing products, such as the Ponytailer  
21 product line was offered for sale in Rite Aid stores, after the limited 6- month license granted to  
22 L&N Sales & Marketing had expired and Conair had subsequently acquired the Scunci  
23 infringing devices and name. The alleged imitations are substantially similar, leading to many  
24 consumers actually confusing the brands when considering the degree of care and attention  
25 likely to be exercised by the purchaser. Nevertheless, the alleged imitations were intentionally  
26 offered for sale, commingled on hooks with the Tonytail devices. The hooks in the stores which  
27 bore the protected Tonytail marks and device designation actually were unfairly replaced with

1 Scunci infringing devices contained on them under the false designation of Plaintiff's protected  
2 trademark. Further, the hooks which had the Scunci name had the protected Tonytail  
3 trademarked products displayed, leading to substantial consumer confusion. Moreover, the  
4 confusingly similar infringing device design of the alleged imitation created further consumer  
5 confusion over the source of Plaintiff's protected trade dress device design. These trademark  
6 and trade dress violations substantially confuse consumers and cause them to believe that  
7 Conair/Scunci are in some way associated with Plaintiff.

8       102. The consuming public was in fact misled, resulting in diminished sales of the  
9 Plaintiff's device and finally in the cancellation of the contractual relationship between plaintiff  
10 and Rite Aid and plaintiff's sales to Rite Aid. Further, the misleading sales and marketing  
11 tactics have led to substantial consumer confusion and irreparable harm to Plaintiff's business  
12 reputation.

13 103. Plaintiff has been, and will continue to be irreparably injured by Defendants'  
14 efforts designed to unfairly compete with Plaintiff in violation of California common law  
15 because it unfairly created consumer confusion and the dilution of Plaintiff's own goodwill and  
16 business reputation.

## **EIGHTH CAUSE OF ACTION**

### **(Injury to Business Reputation and Trade Libel)**

19 104. Plaintiff hereby incorporates the allegations of paragraphs 1 through 103 above as  
20 though fully set forth herein.

105. After meeting with Rite Aid at the NACDS Marketplace in June 2004, and Mia  
Minnelli's first application for Rite Aid vendor status on or about July 8, 2004, Tonytail  
continuously supplied Defendant with Tonytail devices on the basis of an oral agreement.  
Furthermore, Tonytail had entered into negotiations with other mass chain retailers that had  
expressed a high degree of interest in Tonytail® devices.

26 106. Dowell Group on behalf of Rite Aid reassured Tonytail that their business  
27 relationship would be enduring. Also the high interest that other buyers expressed at the

1 NACDS marketplace and the negotiations the potential customers contemplated constituted a  
2 solid basis for Tonytail's reasonable expectations of economic gain because no other device  
3 designs, ornamental appearances, or functional device features were found in the relevant  
4 market for these goods at the time. Moreover, no competing devices or designs incorporated  
5 the patented and protected intellectual property features, as evidenced by the facts that prior art  
6 searches and trademark searches were conducted and Plaintiff's devices, designs and marks  
7 were found to be novel and distinct when compared to the prior art.

8 107. Defendants Conair/Scunci have not only copied protectable elements but the entire  
9 invention of the Tonytail® product. These infringing devices were offered for sale in Rite Aid  
10 stores, commingled on shelves and other forms of display with other Scunci and Tonytail®  
11 devices. The hooks in the stores which bore the Tonytail® name and designation had Scunci  
12 infringing devices on them, and the hooks which had the Scunci name had Tonytail devices  
13 displayed.

14 108. Defendants' manner of promotion was deceptive, and had the tendency to mislead  
15 the public into believing that Scunci produced the Tonytail, was one and the same company or  
16 that Scunci infringing products were approved by, or otherwise associated with the Plaintiff.

17 109. Regardless of whether the public was in fact misled, Plaintiff has been, and will  
18 continue to be irreparably injured by Defendants' efforts designed and/or likely to create injury  
19 to Plaintiff's business reputation and dilution of the distinctive quality of Plaintiff's protectable  
20 intellectual property. Plaintiff experienced diminished sales of Plaintiff's device which resulted  
21 finally in the cancellation of the contractual relationship between plaintiff and Rite Aid and  
22 plaintiff's sales to Rite Aid.

23 **NINTH CAUSE OF ACTION**

24 **(Common Law Trademark Dilution)**

25 110. Plaintiff hereby incorporates the allegations of paragraphs 1 through 109 above as  
26 though fully set forth herein.

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1 MATLOCK LAW GROUP, PC  
2 Anne-Leith Matlock (SBN 244351)  
3 50 California St. Suite 1500  
4 San Francisco, CA 94111  
5 Telephone: (415)-277-5499  
6 (925) 944-7131  
7 Facsimile: (925) 938-4625

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9 Attorneys for Plaintiff:  
10 THE TONYTAIL COMPANY, INC.  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BZ  
07 5895

CASE NO.

COMPLAINT FOR:

1. PATENT INFRINGEMENT OF 'D693
2. PATENT INFRINGEMENT OF 'D239
3. INDUCED PATENT INFRINGEMENT
4. TRADEMARK INFRINGEMENT
5. VIOLATION OF FEDERAL LANHAM ACT, FALSE DESIGNATION OF ORIGIN
6. UNFAIR BUSINESS PRACTICES CA B&P §§ 17200 *et. seq.*
7. UNFAIR BUSINESS COMPETITION
8. INJURY TO BUSINESS REPUTATION
9. COMMON LAW TRADE MARK DILUTION

DEMAND FOR JURY TRIAL

Plaintiff THE TONYTAIL COMPANY, INC (hereinafter "Plaintiff") by its attorneys, as and for their Complaint against Defendants CONAIR, SCUNCI INTL., LTD., RITE AID, L&N SALES & MARKETING, and DOES 1-10 (hereinafter "Defendants") allege as follows:

1           111. Tonytail has the exclusive right to use its intellectual property, its highly  
2 distinctive trademark and trade name, for identification, sale and advertising. Plaintiff  
3 registered its fictitious business name "Tonytail" with the Secretary of State of the State of  
4 California and owns the name's registered word mark.

5           112. Defendants' actions as set forth hereinabove have been and are likely to impair the  
6 distinctiveness of Plaintiff's protectable mark. Scunci's infringing products were offered for  
7 sale in Rite Aid stores, commingled on shelves and other forms of display with other Scunci  
8 and Tonytail devices. The hooks in the stores which bore the Tonytail name and designation  
9 had Scunci infringing products on them, and the hooks which had the Scunci name had  
10 Tonytail devices displayed.

11           113. This manner of promotion was deceptive and had the tendency to mislead the  
12 public into believing that Scunci produced the Tonytail, was one and the same company or that  
13 Scunci infringing devices were approved by, or otherwise associated with the Plaintiff.

14           114. The likelihood that customers are confused by this sales method is tremendous  
15 because of the proximity of the Scunci and the Tonytail merchandise, the actual confusion  
16 expressed by customers and store employees, the common marketing channels, the akin type of  
17 goods and low degree of care likely to be exercised by the purchaser.

18           115. Defendant's actions as set forth hereinabove have harmed and are likely to harm  
19 the reputation of Plaintiff's mark. Plaintiff has been, and will continue to be irreparably injured  
20 by Defendant's efforts designed and/or likely to create injury to Plaintiff's business reputation  
21 and dilution of the distinctive quality of Plaintiff's protectable intellectual property

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**RELIEF:**

24           WHEREFORE, Plaintiff The Tonytail Company, Inc., respectfully request that the  
25 court:

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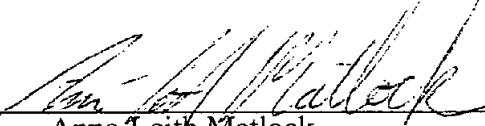
- 1 (a) Enter judgment that Defendants ConAir, Scunci Int'l., Ltd., Rite Aid and L&N  
2 Sales & Marketing, infringed the 'D693, 'D239 and '884 Patent in violation of  
3 35 U.S.C. § 271(a);
- 4 (b) Enter judgment that Defendants ConAir, Scunci Int'l., Ltd., Rite Aid and L&N  
5 Sales & Marketing, induced infringement of the 'D693, 'D239 and '884 Patent  
6 in violation of 35 U.S.C. § 271(b);
- 7 (c) Permanently enjoin Defendants ConAir, Scunci Int'l., Ltd., Rite Aid and L&N  
8 Sales & Marketing, from further infringement of the 'D693, 'D239 and '884  
9 Patent in violation of 35 U.S.C. § 283;
- 10 (d) Award Plaintiff damages in an amount adequate to compensate for ConAir,  
11 Scunci Int'l., Ltd., Rite Aid and L&N Sales & Marketing infringement pursuant  
12 to 35 U.S.C. § 284 and 15 U.S.C. § 117 including an accounting of any and all  
13 profits derived by its illegal acts;
- 14 (e) Increase damages up to three times for ConAir, Scunci Int'l., Ltd., Rite Aid and  
15 L&N Sales & Marketing's willful infringement pursuant to 35 U.S.C. § 284;
- 16 (f) Award Plaintiffs reasonable attorney's fees for ConAir, Scunci Int'l., Ltd., Rite  
17 Aid and L&N Sales & Marketing's willful infringement pursuant to 35 U.S.C. §  
18 285;
- 19 (g) Award Plaintiffs the costs and expenses incurred in this action;
- 20 (h) Award Plaintiffs pre and post-judgment interest at the maximum allowable rate  
21 under the law; and
- 22 (i) Grant Plaintiffs other and further relief the court deems proper.

**DEMAND FOR TRIAL BY JURY**

Plaintiff demands a trial by jury.

1 DATED: November 16, 2007

MATLOCK LAW GROUP, PC

2 By: 

3 Anne-Leith Matlock  
4 Matlock Law Group, PC  
5 Attorneys for Plaintiff  
6 THE TONYTAIL COMPANY, INC.

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## JURISDICTION AND VENUE

2       1.     This is a complaint for Patent Infringement, Induced Patent Infringement,  
3     Violation of Federal Lanham Act Trademark Infringement and False Designation of Origin.  
4     This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. §  
5     1338(a) and 15 U.S.C. § 1121. This Court has related claim jurisdiction over the state law claim  
6     pursuant to 28 U.S.C. § 1338(b) and 28 U.S.C. § 1367.

7       2.     This is a complaint for Unfair Competition (B & P §§17200 et. seq.), Unfair  
8 Business Competition (common law), Injury to Business Reputation, and Common Law  
9 Trademark Dilution.

10       3.     This Court has personal jurisdiction over the defendant corporations, because  
11 the defendants reside in, have a principal place of business in, and/or engage in commercial  
12 transactions sufficient to constitute minimum contacts within the State of California.

13       4.     This Court has original subject matter jurisdiction over this action pursuant to 28  
14 U.S.C. § 1338(a) and 15 U.S.C. § 1121. This Court has related claim jurisdiction over the state  
15 law claim pursuant to 28 U.S.C. § 1338(b) and 28 U.S.C. § 1367.

16       5.     Venue is proper in this district under 28 U.S.C. § 1391(c) because a substantial  
17 part of the events or omissions giving rise to the claims occurred in this district, a substantial  
18 part of the property that is the subject of the action is situated in this district, and the defendants  
19 otherwise have sufficient contacts within this district.

## PARTIES

22       6. Plaintiff is a Delaware corporation with a principal place of business in San  
23 Ramon, County of Contra Costa, and State of California.

24       7.     Defendant Rite Aid, is a Delaware corporation with its principal place of  
25 business in Camp Hill, Pennsylvania. Rite Aid is registered to conduct business in the State of  
26 California, with multiple places of business within the Northern District of California.

1       8.     Defendant ConAir Corporation is a Delaware corporation licensed to do  
2 business in California. In March 2005 it bought or otherwise acquired the assets and liabilities  
3 of Scunci, the "Hair Accessories" Division of L & N Sales and Marketing, Inc.

4           9.       Defendant L & N Sales and Marketing, Inc. was, at all relevant times, a  
5 Pennsylvania corporation having its principal place of business at 2200 Byberry Road, Hatboro,  
6 Pennsylvania 19040 (hereinafter "L&N").

7 10. Scunci International, Ltd., is a domestic entity incorporated in Delaware since  
8 July 22, 1994. It was a subsidiary of L&N until it was acquired by Conair in March 2005.  
9 Currently, Scunci is a division of Defendant Conair. The owners and/or principals of Scunci,  
10 the "Hair Accessories" Division of L&N are and continue to be the current owners and/or  
11 principals, agents or employees of Scunci, a division of Conair.

11. Plaintiff is unaware of the true names and capacities of the Defendants sued  
herein as DOES 1 through 10, inclusive. Plaintiff will amend this complaint to substitute their  
true names and capacities when ascertained. Plaintiff is informed and believes that at all times  
referred to herein, each of the fictitiously named Defendants was the agent and/or employee of  
one of the remaining Defendants and was, in doing the things herein alleged, acting within the  
scope of said agency or employment.

## **FACTS COMMON TO ALL CAUSES OF ACTION**

20        12. In or about the fall of 1997, Mia Minnelli founded The Tonytail Company, Inc.  
21 and its hair product accessory line. Minnelli, is the sole shareholder of The Tonytail Company,  
22 Inc., being one of the few female CEOs in a male-dominated industry with a mainly female  
23 target consumer group.

24 13. On or about May 27, 1998, Plaintiff filed an application for a United States  
25 Patent, Application No. 29/088,568.

1       14. On or about September 7, 1999, a United States Patent was issued on the above-  
2 mentioned application, bearing the designation Des. 413,693, described as "Hair Ponytail  
3 Band." (See Exhibit "A" attached hereto.)

4       15. On or about January 30, 2001, Plaintiff filed an application for a United States  
5 Patent, Application No. 29/136,364.

6       16. On or about January 29, 2002, a United States Patent was issued, bearing the  
7 designation U.S. D453,239 S, described as "Ponytail Holder." (See Exhibit "B" attached  
8 hereto.)

9       17. On July 24, 2001, U.S. Patent No. 6,263,884 B1 was duly and legally issued by  
10 the United States Patent and Trademark Office after having been examined according to law.  
11 (See Exhibit C, attached hereto.)

12       18. At various times after January 29, 2002, principals, agents, and/or employees of  
13 defendant L & N through sources such as Plaintiff's website, came into possession of  
14 information regarding the design and construction of at least one of Plaintiff's devices,  
15 resulting in the manufacture by defendant L&N of products substantially similar to plaintiff's  
16 patented device.

17       19. On September 17, 2002, Plaintiff obtained a trademark with the trademark  
18 registration number 2,621,904 for its word mark "Tonytail". Plaintiff's fictitious business name  
19 was registered with the Secretary of State of California.

20       20. On or about March 31, 2003, defendant L&N Sales and Marketing, Inc. (dba  
21 Scunci, "L&N", "Scunci"), agreed to cease and desist from making and selling the above  
22 mentioned products and signed an agreement to that effect. Thus, Defendants had notice and  
23 knowledge of Plaintiff's Patent No. U.S. 6,263,884 B1, U.S. Design Patent No. D453,239, U.S.  
24 Design Patent No. D453,053, registered trademark "Tonytail®", unregistered product trade  
25 dress and trademark from at least March 31, 2003.

26       21. At some time after March 31, 2003, Defendant Scunci produced other ponytail  
27 holders for sale at various retail locations.

28

1           22. The Scunci Ponytail Holder, for example item 28398-A", is substantially similar  
2 to Plaintiff's ponytail holder device, which is the subject of U.S. Patent No. D453,239 and No.  
3 Des. 413,693 because it includes ornamental features that would induce a consumer to purchase  
4 Defendant's products believing them to be Plaintiff's patented design. The manufacture, sale,  
5 offer for sale, and use of the Scunci ponytailers and ponytail holders also induce infringement  
6 of one or more claims of Plaintiff's U.S. Patent No. U.S. 6,263,884 B1 that includes each and  
7 every limitation found in the one or more claims of Plaintiff's '884 patent.

8           23. At various times after March 31, 2003, and continuing to the present,  
9 Defendants manufactured and sold additional products such as the "Scunci Ponytail Holder",  
10 and these devices were displayed and sold by defendant Rite Aid in one or more of its multiple  
11 retail outlets in California, and specifically in the Northern District of California.

12           24. At the National Association of Chain Drug Stores (NACDS) tradeshow in June  
13 2004, where The Tonytail Company, Inc. presented these products, Mia Minnelli met with  
14 other mass chain retailers who expressed high interest in the Tonytail product. Also  
15 immediately after this June 2004 NACDS tradeshow, The Tonytail Company, Inc. entered into  
16 an oral supply agreement with Rite Aid.

17           25. The Scunci infringing products were offered at Rite Aid stores commingled on  
18 shelves and other forms of display with Tonytail and other Scunci products. The hooks bore the  
19 Scunci name displaying Tonytail products and vice versa.

20           26. ConAir/Scunci influenced other potential commercial consumers to abandon  
21 their negotiations with Tonytail. ConAir/Scunci knowingly and intentionally influenced buyers  
22 to sell defendants' infringing products, and also to not do business with Plaintiff in order to  
23 preserve Defendant's predominance in these retail stores. Defendant knew or should have  
24 known that retailers would reject Tonytail's competing product. At meetings with multiple  
25 potential customers Tonytail was then, in fact, turned down.

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**FIRST CAUSE OF ACTION**

(Patent Infringement as to U.S. Patent D 413,693 -- Title 35 U.S.C. §281)

Plaintiff hereby incorporates the allegations of paragraphs 1 through 26 above if fully set forth herein.

27. Upon information and belief, in violation of 35 U.S.C. §§ 281, 282, and/or 284 Defendants have infringed directly and/or indirectly and still continue to infringe, U.S. Patent D 413,693 (hereinafter “the ’D693 patent”) by practicing the claim of the ’D693 in manufacture, use, offering or sale, and/or importation and exportation of the “Hair Ponytail Band.”

28. On September 7, 1999, Patent No. D 413,693 was duly and legally issued by the United States Patent and Trademark Office after having been examined according to law. Said patent was issued for the ornamental design for a hair ponytail band, as shown and described. A true and correct copy of the patent is attached hereto as Exhibit "A" and incorporated by reference.

29. Plaintiff is the owner by assignment of the 'D693 patent.

30. During the term of the D413,693 patent, Defendants have had notice of the D413,693 patent and thus became aware of the patent and its direct application to the Scunci Ponytailer infringing product line, but failed to comply with the duty of care to avoid infringement.

31. The "Hair Ponytail Band" is Plaintiff's product that embodies the 'D693 Patent.

32. Upon information and belief, Defendants have sold and/or offered to sell infringing devices falling within the scope of the claim of the 'D693 Patent in violation of Plaintiff's rights, thereby infringing the 'D693 Patent. Such infringing products include devices being sold by the defendants using the mark "Scunci" and such as the "Ponytailer" product line.

33. Upon information and belief, Defendants and their successors in interest have had and continue to have notice of the existence of the 'D693 Patent due to its previously executed 2003 settlement and license agreement with Plaintiff, and despite such notice continue to willfully, wantonly and deliberately engage in acts of infringement as that term is defined in

1 Title 35 U.S.C. §281, without regard to the 'D693, and will continue to do so unless otherwise  
2 enjoined by this court.

3 34. Plaintiff has been and will continue to be damaged by the infringing conduct of  
4 Defendants in an amount to be established upon proper proof at trial.

5 35. Upon information and belief, Defendants have, since at least as early as 2007,  
6 used, offered for sale and sold a ponytail holder infringing product covered by the claims of the  
7 'D693 Patent under 35 U.S.C. §281.

8 36. Upon information and belief, the defendants have used, offered for sale and sold  
9 a ponytail holder infringing product substantially similar in ornamental appearance and  
10 misappropriating the 'D693 Patent's point of novelty.

11 37. Upon information and belief, the infringing devices were manufactured in whole  
12 or in part by Scunci, Intl., Ltd., a corporation that was previously controlled and wholly owned  
13 by defendant L&N Sales & Marketing, Inc., and presently controlled and wholly owned by  
14 Defendant Conair, Inc.

15 38. Upon information and belief, Scunci's infringing products have been distributed  
16 to defendant Rite Aid, by defendants' agents and/or employees or persons or companies with  
17 which defendants Conair/Scunci have a contractual relationship for the purpose of distributing  
18 the infringing products. Scunci infringing products have been entered into commerce and have  
19 been offered for sale and sold by Defendants and/or their affiliates in California and within this  
20 judicial district.

21

22 **SECOND CAUSE OF ACTION**

23 **(Patent Infringement as to U.S. Patent D 453,239 S – Title 35 U.S.C. §281)**

24 39. Plaintiff hereby incorporates the allegations of paragraphs 1 through 38 above as  
25 though fully set forth herein.

26 40. Upon information and belief, in violation of 35 U.S.C. §281, Defendants have  
27 infringed directly and/or indirectly and still continue to infringe, U.S. Patent D 452,239 S  
28

1 (hereinafter "the 'D239 patent") by practicing the claims of the 'D239 in manufacture, use,  
2 offering for sale, sale and/or importation and exportation of the "Ponytail Holder."

3       41. On January 29, 2002, Patent No. D453, 239 S was duly and legally issued by the  
4 United States Patent and Trademark Office after having been examined according to law. Said  
5 patent was issued for the ornamental design for a hair ponytail band, as shown and described.  
6 A true and correct copy of 'D239 the patent is attached hereto as Exhibit B and incorporated by  
7 reference.

8       42. "Hair Ponytail Holder" is Plaintiff's device that embodies the 'D239 Patent.

9       43. Upon information and belief, Defendants have sold and/or offered to sell  
10 infringing devices falling within the scope of the claims of the 'D239 Patent in violation of  
11 Plaintiff's rights, thereby infringing the 'D239 Patent. Such infringing devices include  
12 infringing devices being sold by the defendants using the mark "Scunci" and such as  
13 "Ponytailer" product line.

14       44. Upon information and belief, Defendants have had and continue to have notice  
15 of the existence of the 'D239 Patent and despite such notice continue to willfully, wantonly and  
16 deliberately engage in acts of infringement as that term is defined in Title 35 U.S.C. §271 (a),  
17 271(b), and/or 271(c), without regard to the 'D239, and will continue to do so unless otherwise  
18 enjoined by this court.

19       45. Plaintiff has been and will continue to be damaged by the infringing conduct of  
20 Defendants in an amount to be established upon proper proof at trial.

21       46. Upon information and belief, Defendants have, since at least as early as 2007,  
22 used, offered for sale and sold a ponytail holder infringing product covered by the claim of the  
23 'D239 Patent under 35 U.S.C. §281.

24       47. Upon information and belief, the defendants have used, offered for sale and sold  
25 a ponytail holder infringing products substantially similar in ornamental appearance and with  
26 features that misappropriate the 'D239 Patent's point of novelty.

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